

JONATHON N. AMLUNG
ATTORNEY AT LAW
1000 REPUBLIC BUILDING
429 W. MUHAMMAD ALI BLVD.
LOUISVILLE, KENTUCKY 40202-2347

J.D./M.B.A.
LICENSED IN KENTUCKY, OHIO AND COLORADO

TELEPHONE: (502) 587-6838
FACSIMILE: (502) 584-0439
E-MAIL: jonathon@amlung.com

January 26, 2004

**VIA FACSIMILE TO (502) 564-3460
AND HAND-DELIVERY**

RECEIVED

JAN 26 2004

PUBLIC SERVICE
COMMISSION

Mr. Thomas M. Dorman
Executive Director, Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602

**RE: Petition of Southeast Telephone, Inc., for Arbitration of Certain
Terms and Conditions of the Proposed Agreement with
Kentucky ALLTEL, Inc., Pursuant to the Communications
Act of 1934, as amended by the Telecommunications Act of 1996,
Case No. 2003-00115.**

Dear Mr. Dorman:

Please find enclosed for filing an original and ten (10) copies of (A) a Joint Motion for Leave to File Post-Arbitration Briefs outside the Time Allotted by the Commission, and (B) SouthEast Telephone's Post-Arbitration Brief. Please note that in SouthEast's Post-Arbitration Brief, the first issue regarding vertical features was resolved by the parties this morning. Due to time constraints, SouthEast was unable to edit its brief to reflect this change. Please inform the Staff and Commissioners to disregard that argument in its entirety.

Thank you for your attention to this matter. Please do not hesitate to contact me should you have any questions or concerns.

Cordially yours,



Jonathon N. Amlung

Enclosures

cc: Parties of record

RECEIVED

JAN 8 6 2004

PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

Petition of Southeast Telephone, Inc., for)
Arbitration of Certain Terms and)
Conditions of the Proposed Agreement with)
Kentucky ALLTEL, Inc., Pursuant to the) Docket No. 2003-00115
Communications Act of 1934, as amended)
by the Telecommunications Act of 1996)

* * * * *

**POST-HEARING BRIEF OF SOUTHEAST TELEPHONE, INC.
REGARDING CONTESTED UNRESOLVED ISSUES**

Comes now SouthEast Telephone, Inc. ("SouthEast"), by and through counsel, and hereby states that issues remain between the parties in the above-referenced case following Arbitration of this matter that require reconciliation by the Commission in order for an Interconnection Agreement to be finalized between the parties.

CASE HISTORY

On August 7, 2003, SouthEast petitioned this Commission to arbitrate several unresolved issues that arose during negotiations of an interconnection agreement with Kentucky ALLTEL, Inc. ("ALLTEL"). ALLTEL responded, and the parties continued negotiations to resolve all but a few issues. On October 15, 2003, the parties and Commission Staff held an informal conference which succeeded in narrowing the issues further. By the time a formal hearing was held in this case on November 13, 2003, the primary remaining issues centered on pricing, SouthEast's access to UNE-P, and some other related issues. This Commission entered an Order on December 19, 2003, compelling the parties to enter into an interconnection agreement by January 19, 2004.

On January 13, 2004, Jimmy Dolan of ALLTEL e-mailed ALLTEL's version of the interconnection agreement purporting to include all issues that were disputed by the parties and resolved by the Commission. That document, however, contained terms and conditions that were unacceptable to SouthEast and contrary to this Commission's Order.

Specifically, the ALLTEL version of the interconnection agreement contained two issues upon which the parties have been unable to agree. First, the ALLTEL version of the agreement purports to charge SouthEast for all vertical features *in addition to* the port charge, rather than including vertical features *as part of* the port charge.¹ Second, the ALLTEL version of the agreement limits SouthEast's access to unbundled local circuit switching when SouthEast purports to serve an End User with four (4) or more voice-grade (DS0) lines.²

The parties attempted to negotiate these last-minute changes by ALLTEL so as to avoid Commission intervention, but they were unable to reach a resolution. SouthEast requests, therefore, that this Commission consider these two issues and enter an Order as a matter of law compelling ALLTEL to remove these unreasonable barriers to the execution of a fair and equitable interconnection agreement.

ISSUE NUMBER 1: VERTICAL FEATURES

Despite this Commission's Arbitration Order in this case, ALLTEL simply refuses to provide SouthEast with the Verizon rates for unbundled switching elements, which did not include extra fees for vertical features over and above the port charge. In its December 19, 2003, Order, this Commission held that "the rates previously approved by the Commission for Verizon and present in the Verizon interconnection agreements adopted by ALLTEL should be those that

¹ ALLTEL Interconnection Agreement, Section 89.2.1 (attached)

² ALLTEL Interconnection Agreement, Section 89.2.4 (attached)

are available to SouthEast.”³ Nonetheless, ALLTEL changed the Verizon interconnection agreement language regarding unbundled local circuit switching and has attempted to force SouthEast to accept these new draconian terms. The new ALLTEL language reads as follows:

89.2 Local Switching.

89.2.1 The unbundled Local Switching Element includes line side and trunk side facilities (e.g. line and trunk side Ports such as analog and ISDN line side Ports). It consists of the line-side Port (including connection between a Loop termination and a switch line card, telephone number assignment, basic intercept, one primary directory listing, presubscription, and access to 911, operator services, and directory assistance), usage (including the connection of lines to lines, lines to trunks, trunks to lines, and trunks to trunks, charges associated with usage are located in Appendix A Pricing) and the connection between the trunk termination and a trunk card.

Vertical features may be purchased in addition to the Port. Charges for vertical features are listed in Appendix A Pricing.

(Emphasis supplied)

This is, of course, a departure from the Verizon language that should have been used pursuant to this Commission’s Order. That language reads as follows:

The unbundled Local Switching Element includes line side and trunk side facilities (e.g. line and trunk side Ports such as analog and ISDN line side Ports and DS1 trunk side Ports) plus the features, functions, and capabilities of the switch. It consists of the line-side Port (including connection between a Loop termination and a switch line card, telephone number assignment, basic intercept, one primary directory listing, pre-subscription, and access to 911, operator services, and directory assistance), line and line group features (**including all vertical features and line blocking options that the switch and its associated deployed switch software is capable of providing and are currently offered to Verizon’s local exchange Customers**), usage (including the connection of lines to lines, lines to trunks, trunks to lines, and trunks to trunks), and trunk features (including the connection between the trunk termination and a trunk card).⁴

(Emphasis supplied)

Clearly, ALLTEL has disregarded this Commission’s Order regarding the adoption of the Verizon terms and rates for unbundled switching elements. This is not

³ KY P.S.C. Order, December 19, 2003, Page 10.

⁴ Interconnection Agreement between Brandenburg Telecom LLC and Verizon South, Inc. f/k/a GTE South Incorporated, Page 101.

only contrary to the Commission's December 19, 2003, Order in this case, but it is contrary to long-standing precedent at this Commission and at the F.C.C.

ARGUMENT

This Commission decided this very issue in arbitrating an interconnection agreement between MCI and ALLTEL'S predecessor-in-interest, GTE South, Incorporated.⁵ During that arbitration process, GTE proposed two different pricing scenarios regarding local switching elements, both of which included charges to the CLEC for vertical features in addition to the unbundled port charge. The Commission rejected GTE's local switching element pricing proposals, and did not compel the CLEC to pay extra for vertical features in addition to the port charge.⁶

Not only has Kentucky already addressed this issue, but Federal regulations demonstrate that this issue has been addressed at that level as well. In 47 CFR § 51.319(d)(1)(ii), the term "local circuit switching" is defined as including, among other things, "all *vertical features* that the switch is capable of providing." In the FCC's so-called UNE Remand Order,⁷ the Commission held that "the definition of the local switching element encompasses all the features and capabilities of the switch."⁸ The FCC went on to hold that the "local switching element includes all vertical features that the switch is capable of providing, including customized routing functions, CLASS features, Centrex and any technically feasible customized routing functions."⁹

All of these state and federal mandates point to one inescapable conclusion: ALLTEL is prohibited from charging for any vertical features that its switches are capable of providing. The

⁵ Petition by MCI for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated Concerning Interconnection and Resale under the Telecommunications Act of 1996, KY P.S.C. Case No. 96-440; Order dated December 23, 1996.

⁶ Id. at 21, 22.

⁷ FCC 99-238.

⁸ Id. at 111.

⁹ Id. at 111, fn 475.

charges for the port already include charges for vertical features. To permit ALLTEL to bill for vertical features in addition to the port charge would result in a windfall for ALLTEL. SouthEast would essentially be paying ALLTEL twice for the same service. This is clearly inequitable and should be prohibited by this Commission.

SouthEast respectfully requests that this Commission enter an Order prohibiting ALLTEL from departing from the Verizon interconnection agreement language regarding vertical features as part of the local switching element.

ISSUE NUMBER TWO: LIMITATION ON THE NUMBER OF DS0 LINES

In addition to the change of language in regard to vertical features, ALLTEL made a unilateral interpretation of this Commission's decision in Case Number 2003-00347, the so-called "90-day" case,¹⁰ as well as a premature decision of its own in the so-called "9-month" case.¹¹ Specifically, ALLTEL takes the erroneous position that it should not be required to unbundle local circuit switching for SouthEast when SouthEast serves a customer with four (4) or more voice-grade (DS0) equivalents or lines. The disputed language is located in Section 89.2.4 of the ALLTEL version of the interconnection agreement:

Notwithstanding ALLTEL's general duty to unbundle local circuit switching, ALLTEL shall not be required to unbundle local circuit switching for SouthEast when SouthEast serves or is to serve an End User with four (4) or more voice-grade (DS0) equivalents or lines to serve an End User with a DS1 or higher capacity Loop in any service area covered by this Agreement.

ALLTEL's insistence on this new language is supported neither by this Commission's Order in the 90-day case, nor is it supported by the FCC's Triennial Review Order. In this

¹⁰ In the Matter of: Review of Federal Communications Commission's Triennial Review Order Regarding Local Circuit Switching for DS1 Enterprise Customers, Case No. 2003-00347.

¹¹ In the Matter of: Review of Federal Communications Commission's Triennial Review Order Regarding Unbundling Requirements for Individual Network Elements, KY P.S.C. Case No. 2003-00379.

interconnection agreement, there should be no limit on the number of DS0 lines that SouthEast may provision to a customer utilizing ALLTEL's unbundled local circuit switching.

ARGUMENT

ALLTEL must provide SouthEast with nondiscriminatory access to local circuit switching on an unbundled basis, in accordance with § 251(c)(3) of the Telecommunications Act. The FCC held in the TRO that, on a national level, requesting carriers are impaired without access to unbundled local circuit switching when serving mass-market customers.¹²

This Commission's December 19th, 2003, Order in the present case directed ALLTEL to provide SouthEast unbundled local switching "until and unless the Commission finds that mass market unbundled switching and transport should no longer be available as UNEs by ALLTEL in specific areas of the Commonwealth."¹³ Obviously, this language was in reference to both the 90-day case and the 9-month case pending before this Commission.

State and Federal authority clearly grant SouthEast access to unbundled local circuit switching, yet more than a month after the final Order has been issued in this case ALLTEL is still refusing "non-discriminatory" access to the CLEC.

ALLTEL's interpretation of the "four-line" carve-out found in the TRO and the *UNE Remand Order* is erroneous in that it is the exception to the rule and not the rule itself. That exception does not apply in this case.

In the *UNE Remand Order*, the FCC set forth the general conclusion:

[I]n general, requesting carriers are impaired in their ability to provide service in most markets, primarily because of the costs of self-provisioning switching in those markets.¹⁴

¹² TRO at ¶ 419.

¹³ *Id.* at 9.

¹⁴ TRO ¶ 497.

However, the FCC did find that an exception to the rule was warranted under certain circumstances. In both the *UNE Remand Order* and again in the TRO, the FCC determined that incumbent LECs that make EEL combinations available are not obligated to provide unbundled local circuit switching to requesting carriers **for serving customers with four (4) or more DS0 loops in density zone 1 of the top 50 Metropolitan Statistical Areas (“MSA”).**¹⁵ SouthEast is a rural CLEC and does not provide service to any area falling within density zone 1 of any of the top 50 MSAs in the United States. Thus, this limited exception does not apply, and there should be no limit placed on the number of DS0 lines that SouthEast may provision to any single customer using ALLTEL’s unbundled local switching.

MASS MARKET v. ENTERPRISE CUSTOMERS

The term “mass market customers,” as defined by the TRO, means analog voice customers that purchase only a limited number of POTS lines, and can only be economically served via DS0 loops. The TRO further defines mass-market customers as very small businesses who purchase multiple DS0s at a single location.¹⁶ DS1 enterprise customers are defined as “those customers for which it is economically feasible for a competing carrier to provide voice service with its own switch using a DS1 or above loop.”¹⁷

The FCC recognized the fact that the various state commissions were best situated to determine the distinction between mass-market customers and enterprise customers. The TRO states:

We determine that the state commissions are best situated to identify *potential* enterprise customers, *i.e.*, those customers for whom it could be economically feasible to serve using a DS1 or above loop. Because of the expected difficulties and detailed information needed in conducting this inquiry, we allow the states nine months to make this

¹⁵ Id.

¹⁶ Id.

¹⁷ TRO, pg. 280, fn. 1376.

identification, which would include determining the maximum number of lines that a carrier may obtain from a particular customer before that customer is classified as an enterprise customer. We expect such analysis to be conducted at the same time as the analysis of the mass market. State commissions have discretion to define the relevant markets for purposes of this inquiry, provided they follow the guidelines described here and below.

Triennial Review Order, fn. 1376.

ALLTEL's insistence on including the four (4)-line restriction in the proposed interconnection agreement with SouthEast is an attempt to circumvent the FCC's delegation to the Kentucky PSC to identify *potential* enterprise customers and to define relevant markets during the 9-month proceeding that is currently on-going in Kentucky. ALLTEL has attempted to do this before, and the Commission held that this proceeding, "by virtue of its statutory deadline and its limitation as to parties, simply does not permit analysis of the complex factors that will be at issue in" the 9-month case.¹⁸ This Commission went on to note the presumption of impairment mandated by the FCC when a CLEC seeks to provide services to the mass-market. The December 19, 2003, Order held that the "FCC presumption of impairment is so strong, in fact, that it finds that a state could conclude that impairment exists even if otherwise 'automatic' triggers for a 'no-impairment' finding are met..."¹⁹

This Commission is charged with the responsibility of defining mass-market and enterprise customers. The forum for reaching that determination is the 9-month case. As this Commission has held on more than one occasion in this matter, this is not the proper forum to conduct an inquiry into the types of issues that will be decided in the 9-month case. Until that case is decided, there should be no limitation placed on the number of DS0 lines that SouthEast may deploy via unbundled switching to any one customer.

¹⁸ KY P.S.C. Case No. 2003-00115, December 19, 2003, Order, p. 7.

¹⁹ *Id.* at 6.

It should be noted that the proposed interconnection agreement between ALLTEL and SouthEast contains a “change of law” provision that would protect ALLTEL should the Commission find during the 9-month proceeding that requesting carriers are not impaired without access to unbundled local circuit switching.²⁰ In fact, the language crafted by ALLTEL in section 85.5 provides the corporation with a greater degree of protection than most “change of law” provisions in that it envisions an appeal of the Commission’s December 19th, 2003, arbitration Order. ALLTEL has continuously used the threat of an appeal to leverage its position in this matter.

This Commission’s Order required ALLTEL to provide SouthEast with unbundled local circuit switching and transport. In section 85 of the proposed interconnection agreement, ALLTEL agrees to provide SouthEast access to its Network Elements, **except**

86.5 to the extent expressly provided otherwise in this Attachment, for elements or combinations of elements that are no longer by ALLTEL or hereafter ceases to be offered or required (including, but not limited to requirements and changes in Kentucky PSC in case number 2003-00115 and final orders in the 9 month TRO proceeding in the Kentucky PSC, case number 2003-00379) pursuant to, or are not in compliance with the terms set forth in this Agreement

ALLTEL/SouthEast Proposed Interconnection Agreement, page 78.

ALLTEL is also protected from monetary damage by the language contained in section 86.5. In fact, section 86.5 contains procedures and time frames for SouthEast to begin disconnecting non-compliant arrangements and services.²¹

Thus, ALLTEL will not be harmed by this Commission’s decision to refuse to implement any limitations that may or may not be decided in the 9-month case. This is simply not the proper forum to address those issues. The analysis required to reach a definition for the term

²⁰ See ALLTEL/SouthEast Proposed Interconnection Agreement, Attachment 5: NETWORK ELEMENTS, 85.5.

²¹ Id.

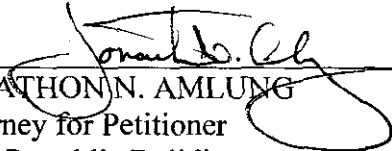
“enterprise customer” versus “mass-market customer” is simply too complex to resolve in this Arbitration. The Commission should refrain from placing any limitation on the number of DS0 lines that SouthEast may provide to any customer via ALLTEL’s unbundled local switching. SouthEast respectfully requests this Commission to enter an Order prohibiting ALLTEL from placing such a limitation on the number of DS0 lines in this interconnection agreement.

CONCLUSION

ALLTEL has continuously evaded and delayed its obligation to provide SouthEast with non-discriminatory access to its facilities as required by the Telecommunications Act. SouthEast was initially ignored by ALLTEL when SouthEast tried to negotiate the terms of interconnection, forcing a petition with this Commission. ALLTEL has reneged on promises to this Commission it made to gain approval of its acquisition of Verizon’s assets. ALLTEL has falsely accused Commission Staff of improper conduct; threatened appeals; made its own unilateral interpretations of FCC mandates, and has disregarded this Commission’s final Arbitration Order.

SouthEast simply requests that this Commission compel ALLTEL to provide SouthEast with access to its facilities under fair and reasonable terms. Those terms should not include double payment for vertical features nor should they include a limitation on the number of DS0 lines that SouthEast may provide to any single customer.

Respectfully submitted,



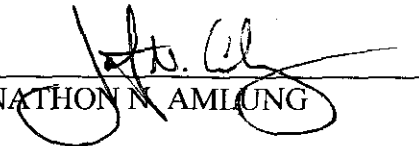
JONATHON N. AMLUNG
Attorney for Petitioner
1000 Republic Building
429 W. Muhammad Ali Blvd.
Louisville, KY 40202
(502) 587-6838

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Motion for Leave to File Outside of Allotted Time was served upon Kentucky ALLTEL, Inc., by mailing a copy of same to:

James H. Newberry, Jr., Esq.
Noelle M. Holiday, Esq.
Wyatt, Tarrant & Combs, LLP
250 West Main Street, Suite 1600
Lexington, KY 40507
(859) 233-2012

This the 26th day of January, 2004.


JONATHON N. AMLUNG

88.4 Collocation in Remote Terminals.

To the extent required by Applicable Law, ALLTEL shall allow SOUTHEAST to collocate equipment in a ALLTEL remote terminal equipment enclosure in accordance with, and subject to, the rates, terms and conditions set forth in the Collocation Attachment and the Pricing Attachment.

89. Unbundled Switching Elements

89.1 ALLTEL shall provide non-discriminatory access to local circuit switching capability and local tandem switching capability on an unbundled basis, except as set forth in this Agreement including the Sections below to Southeast for the provision of a qualifying telecommunications service.

89.2 Local Switching.

89.2.1 The unbundled Local Switching Element includes line side and trunk side facilities (e.g. line and trunk side Ports such as analog and ISDN line side Ports). It consists of the line-side Port (including connection between a Loop termination and a switch line card, telephone number assignment, basic intercept, one primary directory listing, presubscription, and access to 911, operator services, and directory assistance), usage (including the connection of lines to lines, lines to trunks, trunks to lines, and trunks to trunks, charges associated with usage are located in Appendix A Pricing) and the connection between the trunk termination and a trunk card. Vertical features may be purchased in addition to the Port. Charges for vertical features are listed in Appendix A Pricing.

89.2.2 ALLTEL shall offer, as an optional chargeable feature, usage tapes in accordance with Section 59 of the Additional Services Attachment.

89.2.3 SOUTHEAST may request activation or deactivation of features on a per-port basis at any time, and shall compensate ALLTEL for the non-recurring charges associated with processing the order. SOUTHEAST may submit a Bona Fide Request in accordance with Section 95.3 for other switch features and functions that the switch is capable of providing, but which ALLTEL does not currently provide, or for customized routing of traffic other than operator services and/or directory assistance traffic. ALLTEL shall develop and provide these requested services where technically feasible with the agreement of SOUTHEAST to pay the recurring and non-recurring costs of developing, installing, updating, providing and maintaining these services.

89.2.4 Notwithstanding ALLTEL's general duty to unbundle local circuit switching, ALLTEL shall not be required to unbundle local circuit switching for Southeast when Southeast serves or is to serve an End User with four (4) or more voice-grade (DS0) equivalents or lines or to serve an End User with a DS1 or higher capacity Loop in any service area covered by this Agreement.

89.2.5 Where Southeast purchases unbundled local switching from ALLTEL but does not use the ALLTEL CIC for its End Users' LPIC, ALLTEL will consider as local those direct dialed telephone calls that originate from a Southeast End User and terminate within the basic local calling area or within the extended local calling areas and that are dialed using seven (7) or ten (10) digits as defined and specified in ALLTEL's tariff. For such local calls, ALLTEL will charge Southeast the UNE elements for the ALLTEL facilities utilized. Intercarrier compensation for local calls between ALLTEL and Southeast shall be as described in this agreement.